DePaul Law Review

Volume 24
Issue 3 *Spring 1975*

Article 4

Non-Salary Provisions in Negotiated Teacher Agreements: Delegation and the Illinois Constitution, Article VII, Section 10

Gregory N. Freerksen

NON-SALARY PROVISIONS IN NEGOTIATED TEACHER AGREEMENTS: DELEGATION AND THE ILLINOIS CONSTITUTION, ARTICLE VII, SECTION 10

INTRODUCTION

During the past decade numerous bills have been proposed in the Illinois legislature which would give statutory approval to public employee bargaining.[1] Although the passage of such a statute would be the beginning of the analysis of the scope of collective bargaining agreements, it should not be the only consideration. Prior case law, statutes, and constitutional provisions are relevant, as is a discussion of the legal theories relating to the delegation of school board authority.

The development of the law relating to negotiated teacher agreements has proceeded on a case-by-case basis in Illinois since 1966 when *Chicago Division of the Illinois Education Association v. Board of Education*[2] first recognized the legality of teacher negotations. The litigation that followed has resulted in limiting the negotiated agreements by employing the doctrine that school boards may not delegate their authority. The end result has been confusion with respect to what a school board is allowed to bargain away.

Writers, who have examined the nature of teacher negotiations as they have developed in the nation[3] and in Illinois,[4] have recognized that the delegation doctrine has been used as a significant limitation upon the validity of negotiated agreements. However, the literature is surprisingly

1. During the past decade there has been continuing agitation for public school employee collective bargaining. For a comprehensive list of bills see Fletcher, *Illinois Public School Employee's Right to Strike—Constitutional Considerations,* 24 DEPAUL L. REV. 532 n. 7 (1975).

2. 76 Ill. App. 2d 456, 222 N.E.2d 243 (1st Dist. 1966).

3. Edwards, *The Developing Labor Relations Law in the Public Sector,* 10 DUQ. L. REV. 357 (1972); Edwards, *The Emerging Duty to Bargain in the Public Sector,* 71 MICH. L. REV. 885 (1973); Wellington & Winter, *Structuring Collective Bargaining in Public Employment,* 79 YALE L.J. 805 (1970).

4. Clark, *Public Employee Labor Legislation: A Study of the Unsuccessful Attempts to Enact a Public Employee Bargaining Statute in Illinois,* 20 LAB. L.J. 164 (1969); Miller, *The Alice-in-Wonderland World of Public Employee Bargaining,* 50 CHI. B. REC. 223 (1969); Comment, *Teacher Negotiations in Illinois: Current Status and Proposed Reforms,* 23 U. ILL. L.F. 307 (1973).

devoid of a technical discussion of the legal theories relating to this doctrine.

By way of contrast, this Comment will review the two major theories of delegation. The first is a statutory limitation founded in the concept that a unit of local government may not delegate authority without statutory permission. The second is purely a judicial limitation, not dependent upon statutory authorization, which disallows delegations that are not accompanied by adequate standards. It should be noted that because the two theories of delegation are delineated in treatises relating to municipal corporations, their application to school districts will be made by analogy where precise precedents are not available.[5]

This discussion will be followed by an examination of article VII, section 10 of the Illinois Constitution of 1970, which significantly altered the traditional limitations on school boards to delegate authority. Finally, a case-by-case analysis of Illinois decisions involving school board delegation will be made using the theoretical background provided by the treatises.

LEGAL THEORIES OF DELEGATION

Traditionally, school boards delegate their authority by way of negotiated agreements in two ways. First, when the board enters into a negotiated agreement, the result is a bilateral determination of how the school system will operate. To the extent that the teacher organization is successful in the negotiations, there is a delegation of authority.[6] Second, when an arbitrator is appointed, as prescribed by a contractual provision of the agreement, it is the arbitrator, and not the school board who will make the policy decisions according to the agreement.[7] In a narrow sense,

---

5. In Illinois, school boards have been defined as:
> bodies corporate with independent legal existence. . . . Where there are neither local statutes nor precedents on points involving school boards or districts, cases involving the more traditional municipalities can customarily be used analogically with considerable assurance.

3A C. ANTIEAU, LOCAL GOVERNMENT LAW, INDEPENDENT LOCAL GOVERNMENT ENTITIES §§ 30C.00, 30C.01 (1970) [hereinafter cited as ANTIEAU].

6. *See generally* D. MYERS, TEACHER POWER—PROFESSIONAL AND COLLECTIVE BARGAINING 90 (1973); W. MILLER & N. NEWBURY, TEACHER NEGOTIATIONS: A GUIDE FOR BARGAINING TEAMS (1970). For examples and statistics relating to particular non-salary provisions *see* 7-8 NAT'L EDUC. ASS'N, NEGOTIATIONS RESEARCH DIGEST (1974-75). *See also In re* Fort Wayne Community Schools, 61 Lab. Arb. 1159 (1973) where an arbitrator found the school board to have breached the negotiated agreement by failing to give full support to teachers on matters of student discipline; *In re* Rockford Bd. of Educ. & Rockford Educ. Ass'n, 57 Lab. Arb. 1213 (1971) where arbitrator found that board did not breach the agreement which required the board to hire staff with bachelor's degrees.

7. Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 834 (1970). *See also* text accompanying note 17 *infra*.

delegation may be considered to occur only in this latter instance where the school board is not even bilaterally involved in the exercise of its authority.[8]

The interpretation of the non-salary provisions will determine the extent to which the school board will retain unilateral control over the various aspects of school policy and, conversely, will determine the degree to which teachers will have control over the conditions of their employment.[9]

It is often said that these determinations are for the legislature, but it is not probable that the legislature can provide a definitive answer as to what authority a school board may bargain away. Experience in states that have public employee bargaining statutes has demonstrated that in the final analysis it is the courts that must determine who is the appropriate decision-maker in relation to particular school policy items.[10] Courts, however, are in the position of being able to balance the competing interests and determine which of these items should be decided by the school board alone, which ones should be made by the board and the teacher organization, and which ones may include the board, the teacher organization, and an arbitrator. They usually proceed on a case-by-case basis by balancing the interest of the teachers against those of the public represented by the school board.[11] As Professors Hart and Sacks have said:

> Problems arising in a court call for a perceptive awareness not only of what courts are for but of what the legislature is for and sometimes also of what

---

8. The fact that the municipality engages in collective bargaining does not necessarily mean that it has surrendered its decision-making authority with respect to public employment. The final decision as to what terms and conditions of employment the municipality will agree to, or whether it will agree at all, still rests solely with its legislative body.
Fellows v. LaTronica, 151 Colo. 300, 307, 377 P.2d 547, 551 (1962) (concurring opinion).

9. W. MILLER & N. NEWBURY, TEACHER NEGOTIATIONS: A GUIDE FOR BARGAINING TEAMS 39-178 (1970).

10. For an examination of the ways courts approach public employee bargaining statutes, *see* Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460 (1974).

11. New Jersey is a particularly good example of where the scope of bargaining has been determined on a case-by-case basis in a statutory state. Board of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 311 A.2d 729 (1973); Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 311 A.2d 733 (1973); Board of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973). *See also* Aberdeen Educ. Ass'n v. Board of Educ., 215 N.W.2d 837 (S.D. 1974); State College Educ. Ass'n v. Labor Relations Bd., 9 Pa. Cmwlth. 229, 306 A.2d 404 (1973); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); Joint School Dist. v. Employment Relations Bd., 37 Wis. 2d 483, 155 N.W.2d 837 (1967).

> the administrative agency is for and of what matters can best be left to private decision.[12]

This analysis will not be so bold as to suggest the proper decision-makers for the various issues. Rather, it will delineate the various legal theories which provide the context for the balancing process.

Dillon's Rule: The Ultra Vires View of Delegation

Historically, school boards and other units of local government have been viewed as agents or creations of the state legislature for the purpose of providing for public education.[13] As such, a school board's exercise of power has been strictly the product of state legislation. School boards are deemed to have no power to engage in any activity which is not expressly granted to them by the general assembly, implied from an express grant, or essential to the accomplishment of the objective of the school district.[14] This interpretation of the school board's power is an application of Dillon's Rule; a legal proposition enunciated by Judge Dillon at the turn of the century which has been cited as authority for many court decisions. According to Judge Dillon:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensible. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation. . . .[15]

Note that the presumption against a grant of power, which resolves all doubts against the local government unit, makes unlikely a finding of

---

12. H. HART & A. SACKS, *Preface* to THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at iii (tent. ed. 1958).

13. Typical is this statement by the Kansas Supreme Court: "A school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state." Wichita Public Schools Employees Union v. Smith, 194 Kan. 2, 4, 397 P.2d 357, 359 (1964). *See also* School Directors v. Fogleman, 76 Ill. 189 (1875).

14. People v. Bradley, 382 Ill. 383, 47 N.E.2d 93 (1943); School Directors v. Fogleman, 76 Ill. 189 (1875); Glidden v. Hopkins, 47 Ill. 525 (1868); Rosenheim v. City of Chicago, 12 Ill. App. 2d 382, 139 N.E.2d 856 (1st Dist. 1956); Harris v. Kill, 108 Ill. App. 305 (1st Dist. 1903).

15. 1 J. DILLON, MUNICIPAL CORPORATIONS 448-49 (5th ed. 1911) [hereinafter cited as DILLON]. The theory articulated by Judge Dillon, however, had been a part of Illinois law for over half a century. *See* Betts v. Menard, 1 Ill. 395 (1831). Note also that Dillon's Rule is virtually identical to the traditional approach to the doctrine of ultra vires which was applied to private corporations. *See* H. HENN, LAW OF CORPORATIONS 352-53 (2d ed. 1970).

power where it is not obvious that the legislature granted it.

Viewing school districts in this traditional light, delegation of school board authority is ultra vires unless the delegation is either expressly authorized by the legislature, impliedly authorized, or essential to the providing of public education.

> Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot . . . be delegated, so *they cannot without legislative authority, express or implied, be bargained or bartered away.*[16]

Therefore, a delegation of school board authority pursuant to a negotiated teacher agreement would be invalid on two counts. The agreement to arbitrate would be invalid because the school board had bargained away legislative powers,[17] and the delegation to an arbitrator would be invalid, irrespective of the bargaining agreement, because the school board is the only entity allowed to exercise school board powers.[18]

The Discretionary-Ministerial Distinction

There is an exception carved into this general rule which places statutory authority into two separate classifications: discretionary authority where judgment is required and ministerial authority where the act is mechanical. Dillon enunciated the exception in this manner:

> [T]he public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall *judge* best, cannot be delegated to others. . . .
>
> But the principle that the exercise of municipal powers or discretion can-

---

16. 1 DILLON 463 (emphasis added). *See also* 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS 843 (1966) [hereinafter cited as MCQUILLIN]. The rule that delegation is only allowed pursuant to statutory authorization is not to be confused with a similar restriction on delegation discussed in the text accompanying notes 24-51 *infra*. The Dillon's Rule restriction is based on a failure of the legislature to authorize the delegation; while the other is purely a judicial restriction which is effective even where there is legislative authorization.

17. As a school board . . . you may exercise only that authority which has been granted to you by the School Code or other applicable statutes. There is no provision in that Code which authorizes school boards to bargain collectively with labor unions. And so, you can simply tell your teachers that, since [the Code gives you] no authority . . . to bargain with unions, they will have to go back home and await the day upon which the legislature of the State of Illinois sees fit to grant you such authority.

Miller, *The Alice-in-Wonderland World of Public Employee Bargaining*, 50 CHI. B. REC. 223, 223-24 (1969).

18. The two earliest Illinois decisions, both written by Justice Scott, are blatantly contradictory as to whether the concept applies to arbitration. *Compare* Mann v. Richardson, 66 Ill. 481 (1873) (where statutory authorization was found to be a prerequisite to arbitration), *with* City of Shawneetown v. Baker, 85 Ill. 563 (1877) (where arbitration was allowed without a statute).

> not be delegated does not prevent a corporation from appointing agents . . . and investing them with duties of a *ministerial* or *administrative* character.[19]

The rationale for the discretionary-ministerial distinction is that in the instance where a mechanical act is to be performed, it does not make any difference who does it, but only that the act is done. In the case where judgment is required there are usually several alternative resolutions, and only the duly appointed agent of the state has the authority to take action.

In terms of school districts, the general rule is that a board of education may delegate to subordinate officers "functions which are ministerial in nature, where there is a fixed or certain standard or rule which leaves little or nothing to the judgment of the subordinate."[20] This rule was applied in Illinois in *Bessler v. Board of Education*,[21] where a school board claimed that it had notified a teacher of its decision to fire her through the personnel director. The court found that the evidence must show that the school official "was merely conveying the action of the board"[22] and that without such evidence the notice is considered an invalid delegation of school board authority.

The ministerial exception to the prohibition against delegation of authority does not seem a promising avenue for those who wish to inject arbitration and teachers associations into the decision-making process. If these parties are allowed only ministerial roles which do not require the exercise of discretion, then the decision-making process is left to the school board alone. That, of course, is exactly what the doctrine was designed to accomplish.[23]

Adequate Standards: The Reasonableness Limitation

If the Dillon's Rule limitation is inapplicable, because the school board

---

19. 1 DILLON 460-62.

> A distinction is made between discretionary acts, which require the attention of the entire board, and ministerial acts, which require the exercise of judgment or discretion. As a general rule, ministerial acts and duties may be delegated; discretionary acts and duties may not be delegated.

L. PETERSON, R. ROSSMILLER, & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION (1969); *see also* 2 MCQUILLIN 854-58; 1 ANTIEAU § 5.31.

20. 3A ANTIEAU § 30C.08 at 30C-25 n. 7.20 *citing* Big Sandy School Dist. v. Carroll, 164 Colo. 173, 178, 433 P.2d 325, 328 (1967).

21. 11 Ill. App. 3d 210, 296 N.E.2d 89 (3d Dist. 1973).

22. *Id.* at 213, 296 N.E.2d at 91.

23. *See* text accompanying note 117 *infra* where a court used the distinction in finding a grievance *not* arbitrable. *But see* text accompanying notes 120 & 121 *infra* where the same court used the distinction to find another portion of the grievance arbitrable.

has the legal right to delegate authority,[24] then the school board must prescribe a standard or a norm to guide the exercise of any delegated authority.[25] This "adequate standards" limitation is purely judicial in nature, however, and does not have a statutory origin. The court will apply it only when it has determined that the school board is authorized to delegate the authority. As stated by Antieau, "where school board powers can be delegated, the law generally requires that reasonable standards be provided so as to limit as much as possible arbitrary conduct."[26]

Significantly, the "adequate standards" limitation stems from the familiar concept that local government units are limited to only those actions which are reasonable. After an initial presumption in favor of the local unit has been overcome,[27] arbitrary and capricious actions are invalidated by the courts.[28] School boards are accorded a like presumption.[29]

One aspect of the requirement for reasonableness is uniformity in appli-

---

24. The fact that a municipal corporation, or school district, must first have the legislative authority to delegate is best illustrated by the rule as to ordinances:

> An ordinance must, *irrespective of express power to enact* it, provide a uniform rule of action; it must contain permanent legal provisions, operating generally and impartially, and its enforcement cannot be left to the will or unregulated discretion of any municipal authority, officer, or officers. Arbitrary power conferred upon officers cannot be sustained.

5 McQUILLIN 362-63 (emphasis added).

25. This rule that municipal legislation must prescribe a standard or norm governing its enforcement and the exercise of any discretion invested in municipal officers with respect to its enforcement is justified by, if not a corollary of, the rule that a municipal legislative body cannot delegate its legislative power.

5 McQUILLIN 364.

26. 3A ANTIEAU § 30C.08 at 30C-25.

27. The unreasonableness of an ordinance must clearly and plainly appear to justify judicial condemnation of it on such ground. The unreasonableness must be palpable on the face of the ordinance, or evidence of its unreasonableness extrinsic to the ordinance must clearly, plainly and palpably establish its unreasonableness, arbitrariness, or oppressiveness, in order to overcome the presumption of its reasonableness. . . .

5 McQUILLIN 395-96.

28. "[C]ourts will undertake in a proper case to determine whether an ordinance is a reasonable exercise of a municipal power, and in no event will uphold an arbitrary and unreasonable exercise thereof." *Id.* at 343.

29. Generally, school boards have a wide discretion in matters pertaining to the management of schools, or, as otherwise stated, a school board has a wide discretion in the exercise of its powers, and courts will not interfere unless there has been such an abuse of discretion that the action appears arbitrary and discriminatory.

33 ILL. LAW AND PRACTICE 127 (1970).

See, e.g., Richards v. Board of Educ., 21 Ill. 2d 104, 171 N.E.2d 37 (1961); Randolph v. School Unit 201, 132 Ill. App. 2d 936, 270 N.E.2d 50 (3d Dist. 1971).

cation. Without the requisite uniformity, the action is considered arbitrary, capricious or discriminatory. The requirement that adequate standards must accompany a delegation of authority is directed at avoiding a vague, uncertain and inconsistent application of authority.[30] The theory is that without the adequate standards accompanying the delegation, the officer so vested may use the authority in an unreasonable manner.[31]

The sources for the reasonableness limitation are varied. Reasonable classification is thought to be implicit in the equal protection clause of the fourteenth amendment to the United States Constitution and school board actions have been invalidated on that basis.[32] The reasonableness limitation is also found on the state level in the Illinois Constitution of 1970 in article II, section 2, the equal protection clause.[33] Also, uniformity is required in article IV, section 13, which bans special legislation.[34] On the statutory level, reasonableness is an express limitation on any school board rule or regulation.[35]

---

30. An ordinance to be reasonable and valid must be fair, impartial, and uniform in its operation. Although reasonableness is not inconsistent with a reasonable classification of the subjects upon which it operates or the objects of its enactment, an ordinance cannot unreasonably discriminate nor vest discretion in enforcement officers without a reasonable standard or guide to govern them.

5 McQUILLIN 353-54.

See, e.g., Pure Oil v. Northlake, 10 Ill. 2d 241, 140 N.E.2d 289 (1957); Lydy Inc. v. Chicago, 356 Ill. 230, 190 N.E. 273 (1934); City of Sullivan v. Cloe, 277 Ill. 56, 115 N.E. 135 (1917). For application of this principle to school boards *see* Richards v. Board of Educ., 21 Ill. 2d 104, 171 N.E.2d 37 (1961) where the court found that the term "professional growth" was an adequate standard and did not constitute a delegation of legislative power. *See also* People *ex rel.* Fursman v. City of Chicago, 199 Ill. App. 356 (1st Dist. 1916) where a school rule prohibiting union membership was considered void as an unreasonable and discriminatory classification.

31. Arbitrary power conferred upon officers cannot be sustained. Indeed, it is elementary that it is only when the norm or standard for discretionary action under an ordinance is clearly set down that the ordinance can be enforced generally and impartially.

5 McQUILLIN 362-64.

32. Breen v. Kahl, 419 F.2d 1034 (1969); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Courtney v. Board of Educ., 6 Ill. App. 3d 424, 286 N.E.2d 25 (1st Dist. 1972); Laine v. Dittman, 125 Ill. App. 2d 136, 259 N.E.2d 824 (2d Dist. 1970).

33. The major decision under the 1970 Constitution involving reasonable classification is Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) where the court considered both the equal protection clause, article II, section 2, and the ban on special legislation, article IV, section 13. *See also* Courtney v. Board of Educ., 6 Ill. App. 3d 424, 286 N.E.2d 25 (1st Dist. 1972).

34. Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

35. "[The board has the duty:] [t]o adopt and enforce all necessary rules for the management and government of the public schools of their district." ILL. REV. STAT. ch. 122, § 10-20.5 (1973).

The root of the reasonableness doctrine, however, comes from English common law where local units received charters from the king which did not specify the extent of the local unit's powers. It was found that this broad grant of power from the sovereign was subject to the implied condition that all actions of the local unit must be reasonable.[36] As early as 1766, in *Rex v. Spencer*,[37] the reasonableness limitation was used to invalidate an ordinance because it was vague and uncertain and thought to constitute a delegation of municipal authority. Since that time, the doctrine has found its way into United States local government law.[38]

The reasonableness requirement that a delegation of authority be accompanied by "adequate standards" is conceptually very similar to the Dillon's Rule exception which allows delegation of ministerial authority where fixed norms and certain standards are provided.[39] However, the two limitations are distinctly dissimilar. The Dillon's Rule doctrine holds that a delegation is invalid because it is outside the power conferred to the local unit, *i.e.*, it is ultra vires. The "adequate standards" doctrine, by contrast, is purely a judicial limitation which restricts the delegation of legislative authority regardless of statutory authorization.[40]

The net result is three major differences. First, the "adequate standards" doctrine only purports to disallow unreasonable delegations of authority.[41] Second, unlike the Dillon's Rule application, the "adequate

---

36. In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely that *every by-law must be reasonable*. . . .

2 DILLON 924.

37. 97 Eng. Rep. 1121, 3 Burr. 1827 (1766). *See also* City of London v. Vanacker, 91 Eng. Rep. 1231, 1 Ld. Raym. 496 (1699).

38. "The general principle thus formulated, derived from England, that the reasonableness of the ordinance may be open to inquiry, prevails throughout the United States." 5 MCQUILLIN 340. For an example of a United States court citing British precedent in formulating the reasonableness limitation see *In re* Frazee, 63 Mich. 396, 30 N.W. 72 (1886).

39. This rule that municipal legislation must prescribe a standard or norm governing its enforcement and the exercise of . . . its enforcement is justified by, if it is not a corollary of, the rule that a municipal legislative body cannot delegate its legislative power.

5 MCQUILLIN 364.

40. In legal literature the "adequate standards" limitation is sometimes referred to as the "Ranney Rule" after the judge who authored the rule in an early opinion. *See* Cincinnati W. & Z. Ry. v. Commissioners of Clinton County, 1 Ohio St. 77 (1852); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).

41. *See* notes 30-31 *supra*.

standards" doctrine grants a presumption in favor of the local unit.[42] Finally, and most importantly, the Dillon's Rule application is completely dependent upon a failure of authorization to delegate. Once authorization for delegation is found, the limitation is ineffective. The "adequate standards" limitation, by contrast, draws its authority from constitutional, statutory and common law sources. Even where there is authorization to delegate authority, the limitation applies.[43]

The "adequate standards" limitation is also the test used by the courts to review congressional delegation to administrative agencies. However, the federal standard should be distinguished from the standard as it relates to municipal corporations. The former is said to be derived from the separation of powers provision of the United States Constitution, whereas the latter is based on the concept of reasonableness.[44] In addition, the federal administrative standard has been regarded as a total failure in terms of limiting delegations, while the municipal standard is still viable.[45]

The Illinois Supreme Court has adopted the rule that a city is allowed to *delegate to others the authority to do those things which it might properly do itself but cannot do as understandingly or advantageously* as long as the delegation is accompanied by "adequate standards."[46] Using this prin-

42. *See* notes 27-29 *supra.*

43. Administrative action clearly outside the delegated field or not designed to achieve the legislative objective would, in an appropriate judicial proceeding, be held invalid as being outside the power delegated. Legislature and judiciary here combine to prevent the administrative agency from acting ultra vires.

A different method of limiting the area of administrative discretion is reflected in the proposition that "legislative power cannot be delegated." The ultra vires doctrine says the administrative *action* is invalid because it is outside the power conferred. The delegation doctrine says the statute purporting to confer the power is invalid because the legislature cannot delegate its powers. When this doctrine is brought into play, the legislature and the judiciary are no longer collaborators in placing limits upon the administrative. Here, rather, the legislature has expressed a desire to grant authority—and the judiciary has overruled the legislative choice.

W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 58 (6th ed. 1974).

44. K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.00-.17 (1970 Supp.); Merrill, *supra* note 40.

45. *Compare* the analysis of the federal standard in K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.00 (1970 Supp.), *with* the analysis of the municipal standard in 5 MCQUILLIN 362-366.

46. The principle was adopted from the law relating to delegation from the legislature to the local unit. *See* Hill v. Relyea, 34 Ill. 2d 552, 216 N.E.2d 795 (1966); Board of Educ. v. Page, 33 Ill. 2d 372, 211 N.E.2d 361 (1965). In the succeeding cases, however, the rule is also applied where the delegation is from a local unit to its officer.

ciple, the court in *Brown v. City of Chicago*[47] permitted the city to vest in the city collector the authority to determine what information would be required of prospective firearm licensees. The court found that such delegation was permissible and not uncontrolled because the discretion was narrowly limited. The principle was followed in *Bloom, Inc. v. Korshak*,[48] which involved a city cigarette tax. The court permitted the city comptroller to assume the role of setting the commission schedule which would compensate the city's agents in administering the tax.

These cases stand for the proposition that a local government unit may delegate considerable discretionary authority, provided that the major policy decisions are clearly specified and the authority is granted pursuant to a function which the legislative body is not in an advantageous position to perform.[49] By analogy, this principle would permit boards of education to delegate to an arbitrator or teacher association its discretionary authority where the delegation is pursuant to a specific and definitive provision and where it is advantageous for the arbitrator or teacher association to exercise that authority. However, Illinois courts have not squarely approached the issue in regard to the negotiated agreements because of a reliance on the Dillon's Rule non-delegation doctrine which precludes consideration of the "adequate standards" test. In *Brown* and *Bloom, Inc.*, however, the courts seem to imply that the general principle would be held applicable to school board delegations *if* the initial authority to delegate power were found to exist.

There has only been one state court decision where the "adequate standards" concept has been applied to arbitration. In *Board of Education v. Biddeford Teachers Association*,[50] the Maine Supreme Court considered a compulsory arbitration statute, which had been enacted by the state legislature to resolve impasses in the negotiation of teacher contracts. In this case, the statutory authority was found invalid on the ground that legislative power had been delegated without inclusion in the authorizing statute of "sufficient standards . . . to protect the teachers and the public from possible arbitrary and irresponsible exercise of this delegated power . . . ."[51]

47. 42 Ill. 2d 501, 250 N.E.2d 129 (1969).

48. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

49. The requirement that delegation must be to one who is in a more advantageous or understanding position may have satisfied the criticism levied by Professor Davis against the doctrine as it is applied by state courts. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

50. 304 A.2d 387 (Me. 1973).

51. *Id.* at 400.

ARTICLE VII, SECTION 10 OF THE 1970 CONSTITUTION

The initial authority to delegate school board power may well have come with the passage of the 1970 Illinois Constitution. It was the stated purpose of the Convention to reverse Dillon's Rule by way of the local government article.[52] But, most significantly, the attack on Dillon's Rule was not limited to the home rule provision of the constitution. Rather, in the explanation of a non-home rule provision of the local government article, section 10, Delegate Stahl said, on behalf of the Local Government Committee, "we are trying here to reverse the Dillon psychology."[53] In terms of the prohibition against delegating powers, the local government article of the Illinois Constitution, section 10, appears to do just that.

> Section 10. Intergovernmental Cooperation
>
> (a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. *Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance* (emphasis added).

The apparent meaning of the section indicates that traditional impediments to delegation of powers are removed to the extent that the legislature has not restricted that delegation by statute.[54] It would seem then that the limitations on the power of school boards to negotiate contracts with its teachers are unfettered unless prohibited by an act of the legislature.[55]

Further, the Illinois Supreme Court has adopted the "clean slate" doc-

---

52. The Committee on Local Government Majority Proposal made specific reference to Dillon's Rule. *See* SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 7 RECORD OF THE PROCEEDINGS 1603-04 (1972) [hereinafter cited as RECORD OF THE PROCEEDINGS]. The committee reports and the entire Record of the Proceedings of the Convention have been significant in the Illinois Supreme Court's interpretation of the Illinois Constitution. *See* Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 JOHN MARSHALL J. 189 (1975).

53. 4 RECORD OF THE PROCEEDINGS 3421.

54. "In effect, section 10 removes any legal objection to the delegation of government powers on the local government level." Vitullo, *Local Government: Recent Developments in Local Government Law in Illinois, 1971-72 Survey of Illinois Law*, 22 DEPAUL L. REV. 85, 94 (1972).

55. However, not all so called "home rule" powers allow such delegation. *See* State v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955) where a "home rule" city was held not to be empowered to delegate authority pursuant to a city charter which authorized interest arbitration.

trine which holds that section 9 of the constitution's transition schedule makes home rule actions immune from the statutes passed prior to the constitution and which contradict the power granted to them by the constitution.[56] This would seem to indicate that legislation passed prior to 1971, which provided the basis for Dillon's Rule limitations, cannot now limit a school board even though they are non-home rule units. Such statutes that contradict the grant of power given to the school boards by the constitution are not effective as limitations.[57]

A more troublesome issue is whether the authority to "contract and otherwise associate" with non-governmental entities is tantamount to authority to delegate power. The Chicago Home Rule Commission claims that to "contract and otherwise associate"[58] is inclusive of the concept of delegation of power. Indeed, it would seem that contracting and associating are indistinguishable from the additional language in the first sentence which refers to contracting and associating for the purpose of obtaining or sharing services and the exercise, combination or transfer of power or functions.

In further support of this view are the Convention deliberations relating to the Mathis-Martin amendment. Delegate Mathis explained that the amendment would grant to non-home rule units and school districts the same power in relation to individuals, associations and corporations that they were granted in relation to government entities.[59] Immediately after his uncontradicted explanation, the Convention as a whole voted to adopt the amendment.[60]

56. The "clean slate" doctrine does not void statutes predating the constitution. But once a local unit takes affirmative action inconsistent with the state statute, the statute no longer works as a limitation. *See* Peters v. City of Springfield, 57 Ill. 2d 142, 311 N.E.2d 107 (1974); Clarke v. Village of Arlington Heights, 57 Ill. 2d 50, 309 N.E.2d 576 (1974); People *ex rel.* Hanrahan v. Beck, 54 Ill. 2d 561, 301 N.E.2d 281 (1973); Kanellos v. County of Cook, 53 Ill. 2d 161, 290 N.E.2d 240 (1972). *See also* Note, *The "Clean Slate" Doctrine: A Liberal Construction of the Illinois Home Rule Powers*, 23 DEPAUL L. REV. 1298 (1974).

57. The Illinois Supreme Court gave passing notice to the doctrine in relation to article VII, section 10, in Hoogasian v. Regional Trans. Auth., 58 Ill. 2d 117, 133, 317 N.E.2d 534, 543 (1974).

58. The Chicago Home Rule Commission Report and Recommendations 72-73 (1972).

59. Mr. Mathias: [T]here are many special areas that come up, and this would permit those non-home rule units to go ahead and make a contract, unless it was in an area that has been prohibited by legislative action. . . .

. . . .

It would give them the same home rule powers in the private sector that they have in the public sector.

5 RECORD OF THE PROCEEDINGS 4444, 4445.

60. *Id.* at 4446.

Despite the rather forthright meaning and expressed intent relating to the section, there is apprehension lurking in the minds of some commentators that the courts will give a restrictive interpretation to the section.[61] The basis for the apprehension is twofold. First, if the two sentences in fact convey the same power to delegate authority, it would seem that the draftsmen would have added the non-governmental entities to the first sentence, rather than separate them into a second sentence with different language. Second, Delegates Stahl and Wenum, who were appointed by the Local Government Committee to handle the floor presentation of the section,[62] expressed great concern over the delegation of government responsibility to non-government entities. The history of the development of section 10 will at least explain the reason for the above phenomenon, even if it cannot ease the fear that the courts will interpret the section restrictively.

In addition to the Majority Committee proposal, there were four amendments discussed at the Convention relating to this section. The first proposal was presented in the Majority Report of the Local Government Committee. This version had the vigorous support of Delegates Wenum and Stahl, who defended the initial concept against the amendments which were forthcoming. The Committee proposal was substantially the same as the present section 10 except that it did not contain the second sentence which relates to non-governmental entities.[63]

Next in the process came the Martin amendment which added the non-governmental entities to the first sentence of the section so that it would read as follows:

> Units of local government and school districts may agree, contract, cooperate, and otherwise associate among themselves, with the State, with other states and their units of local government and school districts, *with individuals, corporations, associations, and other entities and organizations within or without Illinois.*[64]

---

61. *See* Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning,* 6 JOHN MARSHALL J. 253, 301 (1973); The Chicago Home Rule Commission Report and Recommendations 73 (1972).

62. 4 RECORD OF THE PROCEEDINGS at 3421.

63. Section 11, Intergovernmental Cooperation
11.1 Units of local government and school districts may agree, contract, cooperate, and otherwise associate among themselves, with the State, with other States and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by general law.
7 RECORD OF THE PROCEEDINGS 1747.

64. 4 RECORD OF THE PROCEEDINGS 3425 (emphasis added).

The debates relating to the Martin amendment show that the delegates were well aware that the amendment would allow school districts and other local government units to contract away their authority. It was approvingly noted by Delegate Elward that such language would allow a school district to contract with a private firm to take over the operation of the local school system.[65] Less approvingly, Delegate Wenum noted that a community could contract with a private police service for its law enforcement needs.[66] Troubled by this ability to delegate authority, Wenum said:

> Where the problem comes in is in connection with powers. It might well be, under this language, that a power could be transferred to an individual or corporation; and this is not the intent of the committee [in its proposal]. . . . I believe constitutionally and legally as well as from the standpoint of tradition, [that the powers of government are] to be held and guaranteed in the hands of the units of government. . . .[67]

The Martin amendment failed on a tie vote. But immediately after it failed, Delegate Stahl, on behalf of the Local Government Committee, offered to incorporate the concept in a second sentence using different language but embodying Delegate Martin's concerns.[68]

Thus, the third phase of the development of the Intergovernmental Cooperation section was Delegate Stahl's amendment. It inserted a new sentence following the first and it did indeed deal with non-government entities: "*When authorized by law,* units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations."[69] Strangely enough, even though the amendment embodied the clearest expression of Dillon's Rule and the non-delegation doctrine, it met with no opposition. Delegate Parkhurst went so far as to call the Convention's attention to the fact that this amendment was an "incorporation" of Martin's concept. Delegate Martin expressed his thanks

---

65. Mr. Elward: I support the [Martin] amendment. . . . The Gary, Indiana, School District has contracted with a California firm . . . to take over the operation of one of the schools in Gary, in an underprivileged area. This firm has agreed with the school district to receive the same amount of money per pupil the school district is now spending; and . . . at the end of three years . . . the corporation is to return to the school district the $800 per year per pupil for each pupil below [the national average]. . . . With the amendment . . . this kind of cooperation would be possible.

Id. at 3427-28.

66. *Id.* at 3426.

67. *Id.*

68. *Id.* at 3429.

69. 7 RECORD OF THE PROCEEDINGS 2565 (emphasis added).

for the consideration, apparently not realizing at this time the devastating significance of the additional sentence.[70]

Steps four and five in the process came into play when the Martin amendment sponsors realized the betrayal which the Stahl amendment embodied. Delegate Mathis put forward the Mathis-Martin amendment which transformed the section into its present langauge and reinstated the authority of school districts and non-home rule units to delegate power to non-governmental entities.[71] Before the vote, Delegate Stahl made a last effort to block this authority by making an unofficial counter amendment which reestablished the originally proposed language.[72] Presented with this clear choice, the Convention opted to remove the bar on delegation of powers by passing the Mathis-Martin amendment, eighty-two to five.[73]

Courts have not yet had the opportunity to determine whether section 10 allows the delegation of school board power. But in this respect it is significant to note that in two other jursidictions, Indiana[74] and Ohio,[75] statutes[76] similar to section 10 were held to grant school boards the authority to enter into and be bound by negotiated agreements containing arbi-

---

70. Mr. Parkhurst: Just a word, Mr. President. I want to call Delegate Martin's attention to this amendment. This was his idea, I believe on first reading, by amendment. We have now incorporated the idea, he will note in the ultimate draft. Mr. Martin: Thank you.
5 RECORD OF THE PROCEEDINGS 4165.

71. *See* note 54 *supra.*

72. Mr. Stahl: I am more or less neutral on the Mathias and Martin Amendment. . . . I feel . . . I represent the point of view of the Local Government Committee and [if the amendment does not pass I] will vigorously advocate my amendment to delete the sentence as it presently exists.
5 RECORD OF THE PROCEEDINGS 4445.

73. *Id.*

74. Gary Teachers Union v. School City, 31 Ind. Dec. 540, 284 N.E.2d 108 (3d Dist. 1972).

75. Dayton Classroom Teachers Ass'n v. Board of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

76. [The School Board shall have the power] [t]o exercise any other power and make any expenditure in carrying out its general powers and purposes provided in sec. 201 [§ 28-1709] or in carrying out the powers delineated in this sec. 202 which is reasonable from a business or educational standpoint in carrying out school purposes of the school corporation, including but not limited to the acquisition of property or the employment or contracting for services, even though such power or expenditure shall not specifically be set out herein; . . . .
IND. ANN. STAT. § 28-1710(19) (1970).
The board of education of each school district shall be a body politic and corporate, and, as such, capable of . . . contracting and being contracted with. . . .
OHIO REV. CODE § 3313.17 (1973).

tration clauses. In both cases there was no public employee bargaining legislation to independently justify the delegation of authority to an arbitrator.

SCHOOL BOARD DELEGATION RELATING TO GOVERNMENT ENTITIES

Dillon's Rule and the prohibition against delegating school board authority first entered school law in Illinois early in this century when school districts attempted to operate school systems in conjunction with other school districts or with other government institutions. These early cases are no longer considered an expression of valid Illinois law because of the passage of the 1970 Illinois Constitution. The Intergovernmental Cooperation section certainly allows local government units and school systems to share facilities, even if it doesn't allow delegation of power in the broader context.[77] Also worth noting is that these early cases are instances where a taxpayer intervened seeking to limit school board authority. In contrast, later decisions have the school board seeking limitations on their own authority to make agreements in relation to non-salary provisions.

A 1906 case, *Lindblad v. Board of Education*,[78] involved an effort by a taxpayer to enjoin the Normal Board of Education from executing an agreement which would integrate the school board's facilities and faculty with Illinois State Normal University's model school. The court strictly applied the non-delegation of powers doctrine. It first looked to the legislative enactment upon which the board depended for its authority. In this instance, the authority stemmed from the legislative act which incorporated the Town of Normal[79] and which provided a general authority for the

77. *See* note 63 *supra*; Bieble, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 JOHN MARSHALL J. 253, 299-302 (1973); Note, *The Illinois Intergovernmental Cooperation Act*, 1974 U. ILL. L.F. 498. The Local Government Committee expressed its intended purpose for the Intergovernmental Cooperation section as follows:

> The purpose of this new section is to provide maximum flexibility to units of local government in working out solutions to common problems in concert with other units of local government at all levels "in any manner not prohibited by general law." Paragraph 11.1 [10a] will permit multi-unit endeavors in all areas of local concern.

Report of the Local Government Committee, 7 RECORD OF THE PROCEEDINGS 1747.

Interpretations, however, have not been particularly faithful to the intent of the Committee. *See* Connelly v. Clark County, 16 Ill. App. 3d 947, 307 N.E.2d 128 (4th Dist. 1974); ILL. OP. ATT'Y GEN. NO. S-696 (Feb. 13, 1974); ILL. OP. ATT'Y GEN. NO. S-391 (Jan. 6, 1972).

78. 221 Ill. 261, 77 N.E. 450 (1906).

79. Article VIII, section 11

> The said board of education shall have the entire management and control

school board to operate a school system. Arguably, it might be said that the power was limited only by the statutory purpose of providing a "good system of public instruction." The court disagreed, specifically citing Dillon.[80] It noted that the grant of power was one of great discretion on the part of the school board. But the discretionary authority was limited to the rights and duties necessary for the proper management of the schools. The court found that employing, discharging and assigning of teachers, as well as establishing the length of the school terms, were necessary to the management of the schools and thus properly within the discretion of the school board. But the scope of the discretion did not encompass the power to delegate authority. Presumably, such delegations are unnecessary to the management of the school system and on that basis are ultra vires.

Lindblad was followed on the appellate level by *Stroh v. Casner*[81] which upheld a taxpayer suit which sought to enjoin the issuing of bonds necessary to carry out a contractual agreement between two school districts to jointly build, maintain and use school facilities.

SCHOOL BOARD DELEGATION RELATING TO NON-GOVERNMENTAL ENTITIES

More recent applications of the prohibition on delegation of school board power have most often involved situations where the school board has sought to disclaim delegation of authority to an individual or arbitration association. Using the doctrine as a shield, school boards have often attempted to repudiate contractual agreements by way of disavowing any ability to have made the agreements. This strategy has led observers to note that the prohibition against delegation of powers doctrine is mainly an argument to retain unilateral action by governmental units rather than a valid constitutional consideration.[82]

---

of all the common schools, and transact all business which may be necessary in relation to said common schools in said district, and shall have all the rights, powers and authority necessary for the proper management of the schools and school funds, with the power to make all such rules, orders and requirements as they may deem necessary, to carry their powers and duties into effect and perfect a good system of public instruction and common schools in said district.

3 ILL. PRIVATE LAWS 1867 at 333.

80. 221 Ill. at 271, 77 N.E. at 453.

81. 201 Ill. App. 281 (3d Dist. 1916).

82. Most writers and experts, today, suggest that the sovereignty argument is inappropriate. . . . Today there are many examples of governmental units at all levels that have been engaged in the practice of collective bargaining for a long period of time. It is probably true that the sovereignty argument is mainly an argument to retain unilateral actions by govern-

When the courts have limited the negotiated agreements, they have taken the attitude that the school board has acted outside its statutory authority, and thus, according to Dillon's Rule, such action is not valid.[83] The purely judicial limitation, which is effective regardless of statutory authorization and limits delegations pursuant to "adequate standards,"[84] has not yet entered the decisions.

A 1965 case, *Elder v. Board of Education*,[85] was the first in a series involving school board delegation to non-governmental entities. The plaintiff, a teacher, claimed that she had relied on statements by the superintendent and had lost her job on the basis of that reliance. She argued that the school board had waived its right not to re-employ her because of the superintendent's statements. Applying the non-delegation doctrine, the court noted that the power to make binding promises relating to employment rests only with the school board, and that the superintendent did not possess the powers to make "representations" as to tenure or to waive any rights of the school district.

A year later, in *Chicago Division of the Illinois Education Association v. Board of Education*,[86] a taxpayer intervenor attempted to prevent the school board from bargaining with teacher organizations on the basis that such bargaining constituted a delegation of school board authority. The court chose to define delegation in a restricted sense and determined that delegation through the bilateral process of collective bargaining was within the scope of school board powers, even without legislative authority.

In 1972, the issue of delegation to another for a unilateral determination was litigated in *Board of Education v. Rockford Education Association*.[87] In this case the teachers association and the board of education had entered into a negotiated agreement which had an arbitration clause. Prior to the effective date of the agreement, the board distributed an "announcement of vacancy" to the members of the instructional staff, including Howward Getts who was employed as a guidance counselor by the district. The announcement invited applications for the position of director of personnel and recruitment. Getts applied for the job and was recommended

---

mental units, rather than a valid constitutional argument against collective bargaining.

Illinois Institute for Continuing Legal Educ., 1 ILLINOIS MUNICIPAL LAW § 6.6 (1974).

83. *See* text accompanying notes 13-18 *supra.*

84. *See* text accompanying notes 24-51 *supra.*

85. 60 Ill. App. 2d 56, 208 N.E.2d 423 (1st Dist. 1965).

86. 76 Ill. App. 2d 456, 222 N.E.2d 243 (1st Dist. 1966).

87. 3 Ill. App. 3d 1090, 280 N.E.2d 286 (2d Dist. 1972).

by the superintendent of schools. However, the board of education rejected his application and declined to fill the position at all.

After his rejection, Getts invoked the grievance procedure of the contract and claimed that the board had violated an article of the agreement which provided that all promotional positions would be filled according to certain procedures and "on the basis of qualification for the vacant post . . . ." The grievance procedure included the preliminary steps to arbitration. When arbitration was demanded, the board filed a complaint to stay arbitration and asked for a declaratory judgment. The board argued that the matter of selection or employment of personnel was not arbitrable because it was not included in the professional agreement, and was not delegable by the board. The trial court found for the board.

On appeal, the education association used Dillon's Rule logic, arguing that contracts within the express and implied powers of the school board do not constitute a delegation of the school board's authority. For support, the association looked to *School District No. 46 v. Del Bianco*,[88] where the school board entered into a contract with an architect under the authority of the School Code provision that the board had the duty to "build or move a school house."[89] In *Del Bianco*, there was no question raised as to whether the board's power was limited or delegated by the arbitration clause in the contract. Similarly, the association argued,[90] the school board had entered into a negotiated contract with its staff under the authority of the School Code provision that the board had the duty to "appoint all teachers and fix salaries."[91] The association claimed that there was no basis for disinction between the contracts.

---

88. 68 Ill. App. 2d 145, 215 N.E.2d 25 (2d Dist. 1966).

89. ILL. REV. STAT. ch. 122, § 10-20.11 (1961).

90. Brief for the Appellants at 26-27, Board of Educ. v. Rockford Educ. Ass'n, 3 Ill. App. 3d 1090, 280 N.E.2d 286 (2d Dist. 1972).

91. [The School Board has the duty] [t]o appoint all teachers and fix the amount of their salaries, subject to the limitations set forth in this Act. . . . ILL. REV. STAT. ch. 122, § 10-20.7 (1969). In fact, there is currently no distinction made by the legislature as to any of the duties imposed on the school board by the School Code.

[The School Board has the duty] [t]o adopt and enforce all necessary rules for the management and government of the public schools of their district. ILL. REV. STAT. ch. 122, § 10-20.5 (1973).

[The School Board has the duty] [t]o establish and keep in operation during a school term of at least the minimum length required by Section 10-19. . . . ILL. REV. STAT. ch. 122, § 10-20.12 (1973).

[The School Board has the duty] [t]o keep and maintain, in good repair, all division fences between school grounds and adjoining lands. ILL. REV. STAT. ch. 122, § 10-20.16 (1973).

[The School Board has the duty] [t]o provide for the schools in their district an adequate, clear, palatable and safe supply of water for drinking

The *Rockford* court denied the association's arguments using an abbreviated application of Dillon's Rule or the ultra vires non-delegation doctrine. The school board, claimed the court, could not agree to either limit or delegate any power "granted to it by the School Act."[92] Since the determination of qualifications for hiring is a power granted by the School Code, the court reasoned, it was one which could not be delegated. Unfortunately, the court did not discuss *Del Bianco*, which involved the power to build schools, a power granted the school board by the School Code.

It is possible, albeit impractical, to view the *Rockford* case as holding that any item which is expressly vested in the school board by the School Code is not to be limited or delegated. This interpretation is fraught with problems. Not only would this contradict *Chicago Division*; but also it would have the school board personally build schools, nail by nail, provide water, pail by pail, and repair fences, post by post. These are duties or powers specifically granted to the school board in the School Code.[93] Such a view becomes even less practical when one considers that *all* the school board's powers are granted to it by virtue of the School Code. A broad reading of the *Rockford* holding, under this view, would have the school board being able to delegate only those powers which it did not have, thus making all contracts by the board voidable.[94]

The more practical view of the holding is that it calls for the court to engage in the legal fiction of determining whether a School Code provision is one which the legislature *intended* to be delegable. Note that whether a power is one granted exclusively to the school board or merely granted

---

purposes and for general school use.
ILL. REV. STAT. ch. 122, § 10-20.17 (1973).

92. 3 Ill. App. 3d at 1093-94, 280 N.E.2d at 288. In addition to basing the decision on the non-delegation doctrine, the *Rockford* court also found that there was no agreement to arbitrate the issue. Other states also follow the *Rockford* line of reasoning and refuse to accept any limitation on the school board's authority. *See, e.g.*, Peters v. Board of Educ., 506 S.W.2d 429 (Mo. 1974).

93. *See* text accompanying notes 89 & 91 *supra*.

94. Being able to delegate only those powers which one does *not* have can be analogized to the impossible "catch" one had to overcome to avoid flying more missions in J. Heller's novel on the absurdity of war, CATCH 22:

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22. . . .

J. HELLER, CATCH 22 at 44 (paper ed. 1961).

without exclusive intent is a matter determined solely by a court. The legislative language in the given sections in *Rockford* and *Del Bianco* is identical. If the legislature had any intent with respect to the matter, it was not expressed in words.

A more logical approach to determine which items of the School Code are exclusively granted to the school board would be to use the discretionary-ministerial distinction. Accordingly, items which infringe *upon a school board's discretionary powers to manage and control internal affairs of a school district* cannot be delegated. On the other hand, discretionary powers are *limited to the internal operations of the school* which leaves such matters as architect agreements in the realm of ministerial authority and therefore delegable.[95] To view the *Rockford* holding in the most favorable light is to adopt this approach.

An arbitration clause was again the subject matter of litigation in *Board of Education v. Champaign Education Association*,[96] a 1973 case. The association filed a grievance which culminated in arbitration pursuant to a collective bargaining agreement. The grievance involved the length of the teacher's lunch period. The arbitrator decided in favor of the association and the board asked the court to set aside the award. On appeal, the board did not argue that they had no power to delegate their discretionary authority as the board in *Rockford* argued. However, the contention was clearly available to the board because the power to establish a lunch period is a discretionary power relating to the ability of the board to adopt necessary rules for the management of the public schools.[97]

The court decided the case on the basis of the Uniform Arbitration Act,[98] finding that the court was allowed to vacate the award because the arbitrator exceeded the authority granted him under the agreement. The

95. Arbitration agreements between school boards and architects or other independent contractors, by their very nature, do not impinge upon a school board's discretionary powers to manage and control the internal affairs of a school district. A board's discretionary powers are broad but nevertheless are limited to the internal operations of the school. Such discretionary powers properly include a board's power to make the final determination as to the hiring, firing, transferring, and assigning of its own personnel. On the other hand, its discretionary powers do not include the power to make [a] final determination as to disputes the school district may have with individuals outside of the school district over matters which do not involve the internal operations of the schools.

Brief for the Appellee at 31, Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1st Dist. 1974).

96. 15 Ill. App. 3d 335, 304 N.E.2d 138 (4th Dist. 1973).

97. *See* note 91 *supra*.

98. ILL. REV. STAT. ch. 10, §§ 101 *et seq.* (1973).

only reason the award was not valid was because it was not based on an express provision in the agreement. The *Champaign* court noted that had the arbitration award been pursuant to an express term, it would have been valid.[99]

Significantly, *Del Bianco* was cited and, indeed, quoted as precedent for the decision. *Champaign* thus appears to stand in direct opposition to the *Rockford* holding.[100] This is not to say that the decision is without a legal foundation apart from *Del Bianco*. Using Dillon's Rule language to justify the decision, it could be said that the arbitration clause was "incident" to the power to contract and thereby "implied" from the authority to "hire all teachers."

Finally, in 1974 an appellate court attempted to deal with an arbitration agreement in an analytical manner. In *Board of Education v. Johnson*,[101] two separate grievances arose from an arbitration clause in a negotiated agreement. In the first, a teacher complained that the school board had breached the agreement by involuntarily transferring her to another school when a teacher with less seniority should have been transferred.[102] The second grievance involved two teachers who were required to keep monthly attendance cards, allegedly in violation of a provision in the agreement relieving teachers from clerical tasks.[103] The teachers associ-

99. 15 Ill. App. 3d 335, 341, 304 N.E.2d 138, 142 (4th Dist. 1973).

100. *Id.* at 342, 304 N.E.2d at 143.

101. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1st Dist. 1974).

102. Article IV Section 2. It is agreed that:

. . . .

(b) When involuntary transfer or reassignment is necessary, volunteers from those teachers affected will be transferred or reassigned first. A teacher's qualification, length of service in School District 111 and personal preference shall be major criteria in determining such transfers or reassignments;

(c) The administration, in interpreting teacher qualifications, shall use the following guidelines:

1. Certification;
2. Area of specialization (including degrees, research, publications, etc.);
3. Pertinent experience (educational and vocational); and
4. Teacher's ability as reflected by the whole of the teacher's written evaluation in the District.

. . . .

Section 9. Transfers made because of decreased pupil enrollment in the building shall be based on seniority. If it is necessary to move the teacher out of the school, . . . the classification being reduced shall be the first transferred, and so on. . . .

Id. at 484-85 n.4, 315 N.E.2d at 637 n.4, quoting from the negotiated agreement.

103. Section 4. No teacher shall be assigned duties that are principally clerical in nature, such as . . . the compilation of monthly and yearly attend-

ation pursued arbitration on both grievances and the school board filed for a stay of arbitration and a declaratory judgment.

The trial court found that neither grievance was arbitrable.[104] In dealing with the teacher transfer, the trial court applied the *Rockford* rationale, stating that the grievance was not arbitrable because it was a delegation of the school board's authority. That rationale would not as readily apply to the second grievance because teachers, not the board, were delegating the attendance-taking responsibility. Recognizing this distinction, the trial court found that arbitration of the attendance-taking grievance was not arbitrable because it was an attempt to contravene the section of the School Code that required teachers to keep attendance.[105] Thus, in effect, the trial court extended the *Rockford* non-delegation principle to teachers. The analytical encumbrances that accompanied *Rockford* apply equally to this finding.[106]

The appellate court, in *Johnson*, embarked on a comparatively sophisticated analysis in dealing with the issues. Initially, the court found that as a general rule "minor disputes" or "grievance disputes" are arbitrable.[107] "Minor disputes" are defined in the legal literature cited by the court "as those concerning interpretation and/or application of an existing labor contract . . . ."[108] The term is used in contrast to "major disputes" which are those disputes "concerning the terms of employment to be incorporated into a collective bargaining agreement."[109] According to this definition, both the teacher transfer and the attendance-taking grievances would be considered "minor disputes." The general principle that such disputes are arbitrable was based upon *Chicago Division of the Illi-*

---

ance records, provided that reasonable notice of clerical assistance requirements is given by the teacher to the Building principal or his designee.

Id.

104. *Id.* at 486, 315 N.E.2d at 637, citing the trial court's holding.

105. Teachers shall keep daily registers showing the name, age and attendance of each pupil, the day of the week, month and year. Registers shall be in the form prescribed by the Superintendent of Public Instruction. . . . No teacher shall be paid any part of the school funds unless he has kept and returned such a register.

ILL. REV. STAT. ch. 122, § 24-18 (1971).

106. *See* text accompanying notes 93-95 *supra.*

107. [W]e are of the opinion that arbitration of certain "minor" disputes pursuant to a collective bargaining agreement does not constitute a delegation by the board, and we believe they should be submitted to binding arbitration in the event of impasse.

21 Ill. App. 3d at 491, 315 N.E.2d at 641.

108. Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 n.6 (1968).

109. *Id.*

nois Education Association v. Board of Education,[110] cases from states that had statutory authorization for collective bargaining, and law review articles which indicated that arbitration is a necessary step to implement a negotiated agreement.[111] Also, the *Johnson* court noted that Indiana, a non-statutory state, had adopted the principle using as a basis the Uniform Arbitration Act, a statute that is also available in the Illinois legal setting.[112]

Although the *Johnson* court adopted the general proposition that "minor disputes" are arbitrable, the principle was substantially eroded by a concomitant finding that "certain matters are specifically reserved to the board by the Illinois School Code" and cannot be delegated without statutory authority.[113] *Elder v. Board of Education*,[114] *Stroh v. Casner*,[115] and *Lindblad v. Board of Education*[116] were cited as examples of delegation in contravention of the School Code. Note that this blatant reaffirmation of Dillon's Rule non-delegation doctrine in reality contradicts the initially accepted principle that "minor disputes" are arbitrable.

In determining that the teacher transfer grievance was one that was *not* arbitrable, the court used the discretionary-ministerial distinction[117] to determine the validity of the delegation. The agreement required that the transfer of a teacher be based upon four guidelines: certification, specialization, experience, and ability.[118] The *Johnson* court found those guidelines inadequate because they allowed the arbitrator to exercise his own judgment.

> [T]he agreement . . . does not inform us as to the manner in which they should be used nor does it indicate the weight to be accorded each guideline.
>
> . . . Under these circumstances, to allow an arbitrator to review the decision of the administration would permit the substitution of the arbitrator's

110. 76 Ill. App. 2d 456, 222 N.E.2d 243 (1st Dist. 1966).

111. Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 834 (1970); Note, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 280 (1969).

112. ILL. REV. STAT. ch. 10, §§ 101 *et seq.* (1973). The principal case, Gary Teachers Union v. School City, 31 Ind. Dec. 540, 284 N.E.2d 108 (3d Dist. 1972) also used a statute which granted the school board broad powers in making contracts. *See* note 76 *supra.*

113. 21 Ill. App. 3d at 492, 315 N.E.2d at 642.

114. 60 Ill. App. 2d 56, 208 N.E.2d 423 (1st Dist. 1965).

115. 201 Ill. App. 281 (3d Dist. 1916).

116. 221 Ill. 261, 77 N.E. 450 (1906).

117. *See* text accompanying notes 19-23 *supra.*

118. *See* note 102 *supra.*

> judgment as to the relative importance of each guideline in the ultimate decision.[119]

In this regard the court cited *Rockford* as precedent.

Significantly, however, the *Johnson* court left open the possibility that in another case where the contract is very specific about the standards which an arbitrator is to use in determining a breach of the agreement, a court may hold teacher transfer grievances arbitrable. The logical extension of the court's finding is that where the contract specifies the manner in which guidelines are to be used and the weight accorded each guideline, the matter is arbitrable. Thus, teacher transfer provisions are not inherently considered a delegation of power.

The *Johnson* court also used the discretionary-ministerial distinction in finding the attendance-taking grievance arbitrable. In overruling the lower court decision, the court said that the question of whether the "students' names were to be filled in by the school clerk or by the individual teacher" was not within the contemplation of the legislature. Thus, "the statute refers only to the mechanical function of filling in, on a daily basis, the attendance."[120] It is more than coincidence that the decision uses language which was based on the discretionary-ministerial distinction. The court was made aware of the distinction by the arguments in the appellate briefs.[121]

There was wisdom, however, in the court's failure to fully articulate the discretionary-ministerial distinction. Although the distinction would prevent the school board from having to personally perform duties mandated by the School Code, such as fence repair and the provision of fresh water, because they are ministerial; it would also lock the courts into finding, as incapable of delegation, the duty, also mandated by the Code, to establish all rules and regulations because of their discretionary nature. Application of the discretionary-ministerial distinction, for instance, would disallow arbitration of the attendance-taking grievance if it were pursuant to a rule or regulation of the school board.

DELEGATION IN AGREEMENTS WITHOUT ARBITRATION CLAUSES

School board attempts to retrieve their authority from negotiated agreements that do not contain arbitration clauses have been singularly unsuc-

119. 21 Ill. App. 3d at 493, 315 N.E.2d at 643.

120. *Id.* at 495, 315 N.E.2d at 644.

121. The school board used the distinction to differentiate *Del Bianco.* Brief for the Appellee at 31, Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1st Dist. 1974).

cessful. Two recent cases deal with negotiated agreements that impose conditions precedent to the exercise of board authority. In a broader context, these cases may provide the basis for the courts to review teacher agreements through the doctrine that school board actions must be reasonably related to the providing of public education. This doctrine would allow courts to engage in a balancing process in determining the validity of negotiated agreement provisions.

In the first such case, *Classroom Teachers Association v. Board of Education,*[122] the negotiated agreement included a provision which required certain procedures relating to notification of transfer, notification of reasons for the transfer, evaluation and a hearing on the transfer, to be precedent to any involuntary teacher transfer. The board transferred a teacher without following these procedures and the association filed suit to have her reassigned to the original position. The board, relying on *Rockford,* argued that the negotiated provision was a limitation on the exercise of the board's authority to appoint all teachers and, therefore, a delegation of that authority.

The appellate court rejected this position, finding that no provision of the agreement restricted the board's authority to hire, discharge, or transfer teachers. Such conditions precedent to the exercise of such authority were found to be "fair and reasonable," suggesting that the court relied on the reasonableness standard in making its decision.

> The Board has voluntarily agreed to follow *reasonable and fair* evaluation procedures preliminary to any involuntary transfer of the teacher. If the Board had kept its bargain it would have had the basis of making an informed judgment prior to the transfer of the plaintiff teacher who, in turn, would have had clear warning of her deficiencies with ample opportunity to correct them or to suffer the consequences. We believe that such bargain is consonant with public policy and should be enforced.[123]

Note that the court placed a presumption in favor of the negotiated agreement. But apparently such a presumption could be overcome upon a showing of "unreasonableness."[124]

The concept was followed in *Illinois Education Association v. Board of Education,*[125] where a similar provision required conditions precedent to the discharge of a teacher. The court in that case granted tenure status to a non-tenured teacher who was dismissed by the board without performance of the conditions. It can be argued that these cases stand for the

122. 15 Ill. App. 3d 224, 304 N.E.2d 516 (3d Dist. 1973).

123. *Id.* at 229, 304 N.E.2d at 520 (emphasis added).

124. *See* text accompanying notes 23 & 24 *supra.*

125. 23 Ill. App. 3d 649, 320 N.E.2d 240 (1st Dist. 1974).

proposition that once a school board enters into an agreement, it is bound by it, provided that the agreement is a reasonable exercise of school board authority.

The holdings in these cases are similar to the rule expressed in cases which relate to salary schedules. In *People ex rel. Cinquino v. Board of Education*,[126] the board had determined that a teacher had a foreign academic degree which was equivalent to a doctorate. Later, the board decided to reevaluate the degree with the result that it revoked the teacher's doctorate status, and reduced him on the salary schedule. The court found that once the board had exercised its discretion to formulate salary policy, there was a presumption in favor of the original determination. This is virtually identical to contract law.[127] The rule was best expressed in the case of *Cohn v. Board of Education*.[128]

> [O]nce the Board of Education has exercised its discretion to interpret its rules liberally so that a teacher is placed in a certain salary bracket, it had no power to later rerate that teacher perspectively on the theory that the original rating was too high. Once having acted, the Board, in the absence of fraud, duress or mistake, has lawfully exhausted its power over that subject matter.[129]

The common factor in all of these cases is that on certain matters the courts will place a presumption in favor of an agreement made by the school board. In situations where salaries are concerned that presumption is overcome only by contract defenses. But in non-salary situations the presumption may be overcome by a showing that the agreement is unreasonable.

This proposition suggests that to retrieve its authority from an agreement the board must demonstrate to the courts that its initial entry into the agreement was unreasonable and therefore invalid. Reasonableness, in this respect, is a different aspect of the same principle discussed previously.[130] The reasonableness limitation seemingly contemplated by the court in *Classroom Teachers* refers to whether the negotiated provision is reasonably related to the providing of a system of public education. Antieau has stated that "the acts of school authorities must be within the authority committed to them and must bear some rational relation to the furthering of the objects for which the board exists."[131] It was found in

126. 86 Ill. App. 2d 298, 230 N.E.2d 85 (1st Dist. 1967).
127. 12 ILL. LAW AND PRACTICE, *Contracts* ch. 6, §§ 115-26 (1955).
128. 118 Ill. App. 2d 453, 254 N.E.2d 803 (2d Dist. 1970).
129. *Id.* at 458, 254 N.E.2d at 805.
130. *See* text accompanying notes 24-51 *supra*.
131. 3A ANTIEAU § 30C.08 at 30C-24.

Classroom Teachers that "[t]he procedures in the agreement only serve to maintain a high standard of efficiency and professionalism in the school system."[132] The court indicated that the result would have been different without such a finding.

> We agree with the trial judge that public schools are not created nor are they supported for the benefit of the teachers therein, but for the benefit of the pupils and the resulting benefit to their parents and the community at large.[133]

The fact that the provision in the agreement was reasonably related to the school system's purpose appeared to be the major factor in sustaining the provision.

CONCLUSION

It should be apparent that the prohibition on delegation as it stems from Dillon's Rule cannot provide a basis for cogent and consistent court decisions in relation to negotiated teacher agreements. The doctrine's validity can be questioned in two major respects.

First, the Illinois Constitution of 1970 purports to remove prohibitions on the delegation of school board authority, and it may be considered to authorize the school board to make any negotiated contract. Second, the doctrine is the manifestation of a legal philosophy which sought to retain absolutely government power in the hands of the legislature and its agents. Traditionally, collective bargaining was precluded by that doctrine. In spite of this fact, courts have authorized the negotiations in the first instance and then have attempted to control and check the provisions of the resulting agreements by way of once again dredging up the Dillon's Rule ultra vires rationale. This puts the courts in the position of trying to balance interests through a doctrine which is void of balancing concerns. Further, since the doctrine is dependent on the School Code, the courts are forced to pretend to find legislative intent to authorize delegation where, in fact, the legislature had expressed no intent.

This problem is caused by an honest attempt on the part of the courts to regulate the negotiated agreements. However, a better mechanism for regulation is available in the rule established in *Brown v. City of Chicago*[134] and *Bloom, Inc. v. Korshak*,[135] where the "adequate standards" requirement of the reasonableness limitation was delineated. The rule

132. 15 Ill. App. 3d at 228, 304 N.E.2d at 519.
133. *Id.* at 229, 304 N.E.2d at 520.
134. 42 Ill. 2d 501, 250 N.E.2d 129 (1969).
135. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

would allow the school board to "delegate to others the authority to do those things which it properly could do itself but cannot do as understandingly or advantageously"[136] as long as the delegation provides adequate standards. This principle, in combination with the reasonable relationship to the "providing of education" principle expressed in *Classroom Teachers*, provides the courts with an array of balancing mechanisms by which to review teacher agreements.

Pursuant to this standard of review a school board would be permitted to retrieve authority from a negotiated agreement in three ways. First, the school board could demonstrate that the agreement did not embody adequate standards and that, therefore, the agreement permitted the delegation of uncontrolled discretion. Second, the board could show that a teacher association or arbitrator is not in an advantageous position to exercise the delegated authority. And third, by using the "relationship to purpose" test, the school board could show that the agreement provision does not bear a rational relationship to a "good system of public instruction." If courts review agreements in this manner, it will allow them to inject a balance of public interest against the teachers' contract rights. Such a balance is virtually impossible with the present Dillon's Rule limitation.

Such a standard would, in the first instance, grant a presumption in favor of the provision in the negotiated agreement and this would take the courts out of the position of making school policy decisions that should have been made at the bargaining table. In the past the courts have wisely refused to review school board policies when there is no showing that the policies are unreasonable: "[T]he judiciary is ill equipped to act as a super school board in assaying the complex factors involved in determining the best interests of schools and pupils affected."[137] The negotiated agreement should be considered another such policy, and courts should be reticent in voiding such agreements.

A final advantage of the "adequate standards" approach to regulating delegation is that it is not invalidated by article VII, section 10 of the 1970 Illinois Constitution. Unlike the Dillon's Rule limitation, the "adequate standards" limitation is not dependent on the action or inaction of the state legislature. It is a limitation which survives the "clean slate" interpretation of section 9 of the transition schedule of the 1970 Constitution be-

136. *Id.* at 569, 284 N.E.2d at 257; 42 Ill.2d at 506, 250 N.E.2d at 132; both cases quoting from Hill v. Relyea, 34 Ill. 2d 552, 555, 216 N.E.2d 795, 797 (1966).

137. Randolph v. School Unit 201, 132 Ill. App. 2d 936, 938, 270 N.E.2d 50, 52 (3d Dist. 1971).

cause it does not arise by a pre-existing statute. Given the courts' sense of obligation toward protecting the public interest with regard to negotiated teacher agreements, it would seem that they have chosen the wrong legal theory in providing that protection. Even if the Dillon's Rule limitation could provide a balancing of the public interest against the rights of teachers, it would seem that it is vulnerable to attacks from the 1970 Constitution.

Gregory N. Freerksen